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9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA**

11 **SAN FRANCISCO DIVISION**

12

13 NAPOLEON EBARLE, JEANNE
14 STAMM BRIAN LITTON and
15 REINER JEROME EBARLE, on
16 behalf of themselves and all others
similarly situated,

17 Plaintiff,

18 *vs.*

19 LIFELOCK, INC.,

20 Defendant.

21 Case No.: 3:15-CV-00258

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23 **NOTICE OF OBJECTION AND**
INTENTION TO APPEAR

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28 The instant case is the hallmark of a “tag-along” action. The Federal Trade
Commission [hereafter “FTC”] commenced the underlying enforcement action
which raised serious and substantial questions as to Lifelock, Inc.’s [hereafter
“Lifelock”] conduct. Out of a \$100 million dollar fund that originated from the

1 actions solely because of the competence of the FTC, the class plaintiffs have
2 managed to segregate \$68 million. Incomprehensibly, the Notice affirmatively
3 misleads the class, asserting that, "If the proposed Settlement is approved and
4 becomes final, Lifelock has agreed to pay \$68 million to a Settlement Fund." The
5 assertion flies in the face of the FTC Settlement Agreement with Lifelock. Rather,
6 the FTC has allowed \$68 million of the \$100 million dollar penalty payable to the
7 FTC to compensate Lifelock's customers. Class counsel seeks to claim credit
8 where credit is not due. Everyone knows this. The FTC action was successful.
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10 There is no evidence the FTC needed any help or got it from Class counsel.
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12 Rather, the FTC, utilizing its independent judgment is now allowing some of the
13 money it obtained from Lifelock to flow to the class. The notion that Class counsel
14 did anything other than confirm whatever discovery needed to be confirmed
15 renders the underlying fee application, patently absurd. This is overreach by
16 attorneys who are claiming incredibly inflated rates for achieving, essentially,
17 nothing. Kudos to Lifelock's counsel for achieving a settlement here; two for the
18 price of one. If Class counsel genuinely was instrumental in achieving the \$68
19 million fund; why not have fees payable out of the fund? Presumably, it is because
20 the FTC would not have allowed it. The Court should inquire as to
21 communications between the FTC and Class counsel. Why is it that Class counsel
22 elected to seek payment directly from Lifelock? It was not to save the class
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1 money, certainly. This is because Class counsel unilaterally disarmed. Lifelock
2 agrees to pay a certain amount. However, the Court need not blindly award this
3 sum. This money, had it been joined with the fund would have innurred to the
4 benefit of class members, in the event Class counsels' fees were reduced. Class
5 counsel left money on the table; and conflicted themselves out in the process. But,
6 here's the point; as Class counsel did not create the \$68 million dollar fund; they
7 had no entitlement to it. Thus, Class counsel had to get Lifelock to settle away a
8 case that already settled with the FTC. The settlement simply is not fair and is, in
9 essence, a big payoff for Class counsel who elected to ride the coat-tails of the
10 FTC; they got a big reward; enormous fees; the class realized almost nothing. The
11 Notice makes it seem that Class counsel was somehow instrumental. The FTC
12 gets no credit. The prior settlement with the FTC is ignored or glossed over. It
13 would seem that Class counsel orchestrated a great deal here; a \$68 million fund
14 for the Class and the fund is not even diminished to pay the lawyers who claim to
15 have negotiated such a great deal. But, unknown to the Class, Class counsel
16 actually parsed the FTC deal; taking a piece that the FTC had already obtained.
17 Moving shells on the board achieves nothing. Obviously, the FTC would facilitate
18 a carve-out because that is what the FTC does. The notion that the FTC would
19 take all the money from the settlement and not distribute any portion to class
20 members is silly. The FTC was valiant in its efforts. Class counsel essentially
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1 reviewed the FTC's work; taking just two depositions in the process; and then
2 somehow "earned" ten million plus in fees. This cannot be allowed to stand. The
3 hourly rates are enormously inflated. The time spent does not square with actual
4 work done. The settlement is unfair in any event and totally unreasonable.
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6 In other words, the FTC obtained the result; the class attorneys managed to
7 convince both Lifelock and the government that a portion of the FTC created fund
8 should be disseminated to the Class. The settlement agreement in fact, stipulates
9 that most of the discovery produced in this case was informal and evidently
10 confirming. Two depositions were taken. How many attorneys for the class
11 attended these depositions? How many asked questions? Yet, class counsel seeks
12 over ten million dollars in fees payable by Defendant on an FTC fund class counsel
13 did not create. Here's what is stated in Lifelock's annual report:
14

15 "On March 13, 2014, we received a request from the FTC for documents and
16 information related to our compliance with the FTC Order. Prior to our receipt of
17 the FTC's request, we met with FTC Staff on January 17, 2014, at our request, to
18 discuss issues regarding allegations that have been asserted in a whistleblower
19 claim against us relating to our compliance with the FTC Order. On October 29,
20 2014, we completed our responses to the FTC's March 13, 2014 request for
21 information, and on January 5, 2015, we provided responses to subsequent FTC
22 requests for additional information. On July 21, 2015 the FTC lodged, under seal,
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1 in the United States District Court for the District of Arizona, a motion seeking to
2 hold us in contempt of the FTC Order. On December 17, 2015, we entered into a
3 comprehensive settlement agreement with the FTC, pursuant to which we resolved
4 all matters related to the FTC Contempt Action and the Ebarle Class Action. Under
5 the terms of the settlement, \$100 million was placed into the registry of the court
6 overseeing the FTC Contempt Action, \$68 million of which is to be distributed to
7 the court overseeing Consumer Class Action to fund the consumer redress
8 contemplated by the Consumer Class Action settlement, and the remaining \$32
9 million of which is authorized to fund consumer redress ordered by any states'
10 attorneys general, provided that certain conditions are met. If all or part of the \$32
11 million is not used for that purpose, it will revert to the FTC. On January 19, 2015,
12 plaintiffs Napoleon Ebarle and Jeanne Stamm filed a nationwide putative consumer
13 class action lawsuit against us in the United States District Co. for the Northern
14 District of California. The plaintiffs allege that we have engaged in deceptive
15 marketing and sales practices in connection with our membership plans in violation
16 of the Arizona Consumer Fraud Act and seek declaratory judgment under the
17 Federal Declaratory Judgment Act. On March 27, 2015, plaintiffs filed an amended
18 complaint, adding an additional plaintiff, Brian Litton, adding a breach of contract
19 claim, and expanding the class period to include all members enrolled in one of the
20 company's identity theft protection plans since January 1, 2010, through the
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1 present. On November 3, 2015, LifeLock signed an agreement to settle the Ebarle
2 Class Action and release all of the class's related claims. The Ebarle Class Action
3 settlement remains subject to court approval. On November 4, 2015, plaintiffs filed
4 a motion for preliminary approval. The hearing on Plaintiffs' motion for
5 preliminary approval of the class action settlement agreement was held on
6 December 17, 2015, before the court overseeing the Ebarle Class Action. The court
7 overseeing the Ebarle Class Action granted the motion for preliminary approval on
8 January 20, 2016. On February 11, 2016, the court overseeing the FTC Action
9 entered an order allowing the \$68 million to be transferred from the court's registry
10 to the settlement administrator in the Ebarle Class Action to fund the settlement. A
11 hearing on final approval will be held on June 23, 2016."

12 All of the declarations are coy as to the amounts claimed by counsel for work
13 actually performed. It appears the settlement was a product of collusion; class
14 counsel simply bootstrapping off of the FTC and then extracting a very generous
15 payment for the compromise of claims. The record speaks for itself.

16 The collusive settlement is confirmed by the excessive nature of the fee
17 request; which is the subject of a clear-sailing agreement. This entire settlement
18 needs heightened scrutiny. Why would Lifelock agree to pay separately? Were
19 fees discussed during negotiations? The Court needs to know who said what to
20 whom and when. There is a probability fees were discussed at the outset, colusion
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1 compounded by the inadequacy of the underlying deal. In the meantime, class
2 counsel were inadequate representatives; having sought a fee directly from
3 Defendants so as to avoid scrutiny from their own clients. Class counsel shall
4 likely claim there is a lack of standing; ignoring that by its very actions in carving
5 out a separate and independent payment directly from Lifelock it foisted a massive
6 conflict that could not be reconciled over the entire class. Class counsel and the
7 named representatives are inadequate. The early pay provision is also a conflict.
8
9 Why would Lifelock agree to this, if the settlement came first, and fees afterward.
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11 It is obvious that some portion of a fee negotiation must have come first; as no
12 reasonable settling defendant would agree to pay money if it could wait. If Lief
13 Cabraser were even good for the advance payment of money, contingent on
14 repayment in the event of reversal, which is totally unknown, further problems are
15 created. Will the class be stuck with a potential bad debt? Even a contingent debt,
16 which is precisely, what is created here violates the canons of ethics in the absence
17 of adequate disclosure. Yet, the Notice is utterly silent. No attempt is made for
18 informed consent. The Court need only remember Brobeck and Heller Ehrman.
19
20 Others exist. Why is it assumed, that without the execution of a sufficient surety
21 note, Lief Cabraser will simply return the money in the event of reversal or
22 overpayment? What facts support such a provision.¹ The class is stuck with any
23 potential bad debt. If Lief Cabraser were to dissolve, what assurances are there of
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1 repayment. Prior law partners of the Lief Cabraser firm have previously sought
2 dissolution of it. What happens to the Class should the next case be met with
3 success? Yet there are no affirmative disclosures to the class the the lawyers are to
4 be first; and class members potentially exposed to liability to repay LifeLock in the
5 event the Class attorneys cannot satisfy repayment obligation. This is a conflict
6 barred by the Rules of Professional Responsibility. There was no waiver of
7 conflict; there could be no waiver under the circumstances. The Class attorneys
8 are proceeding detrimentally to the interests of their own clients.

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12 The fees sought are based on grossly inflated rates. Michael Sobol, for
13 example, believes his reasonable fee is \$850.00? This seems way too high. Mr.
14 Sobol is a wonderful attorney; but even wonderful attorneys are not worth \$850.00
15 per hour in a class action with little contingent risk and that settled quickly based
16 on government enforcement efforts. What are the FTC rates? The maximum FTC
17 rates should be the maximum that the Class attorneys are entitled to receive. These
18 ginormous fees cause a massive ethical disconnect between the attorneys
19 purporting to represent the class and lay class members. Fee applications should
20 not be a get-rich quick scheme.

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24 The fees which are sought are plainly excessive and everyone knows it. No
25 class member would have ever bargained, at arms-length, for such excessive fees
26 in good faith. Hank Bates claims his rate is \$750 an hour. Same with other
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1 partners. Most of the alleged work was performed by partners; presumably
2 including such lowly steps as “document reviews.” Why wasn’t the work
3 distributed more efficiently? What was so novel? What was so complex? Given
4 the FTC had already created the fund; query where any contingent risk actually
5 existed.

6 How many attorneys for the class staffed the two brief depositions? Why
7 was staffing compounded and this compounding multiplied? Why weren’t
8 paralegals, at far more reasonable rates, tasked with performing a review of just
9 10,000 pages of documents? Why weren’t associates utilized more efficiently?
10 How does Mr. Sobol’s rates in other class actions square with his claimed rates in
11 this action? There was not such a massive volume of work that should have been
12 required; there is an absence of evidence demonstrating why the claimed amounts
13 was or could be required under any possible circumstance. The declarations in
14 support of the excessive fees are not meaningful; failing to discuss the work
15 claimed to be required or why. No specifics are provided. Facts are ignored. No
16 fee should be awarded here under the circumstances.

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23 Respectfully submitted,
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26 Dated: April 6, 2016

27 /s/ _____

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Declaration of Walter F. Ellingwood, III

I, Walter F. Ellingwood, III, hereby declare as follows:

1. As a preliminary, matter, I am a class member in this case. Per the class settlement agreement, the ““Class’ means all members of a Lifelock identity theft protection plan in the United States at any time between September 1, 2010, and the date of the Preliminary Approval Order. Lifelock estimates there will be approximately 6.8 million Class members.””
2. I have attached Exhibits A and B. Exhibit A reflects the temporary user ID that was provided when I signed into my Lifelock account for the first time. It is “8dvqmbty.” On the document, I have redacted the password. The parties are hereby alerted that any attempt to access my Lifelock account and view my confidential membership information is not allowed and I tender an objection to such a privacy invasion. Neither LifeLock’s attorneys nor the attorneys for the class have a right to violate the terms of agreement with Lifelock, procedural requirements, or anything else. The password shall not be provided absent a Court Order.
3. The email address that I used at the time was “walter@wfe3.com.”
4. My address is confidential. If any party has any questions, they may direct them to my attorney and he is authorized to meet and confer on my behalf.

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 6, 2016.



Walter F. Ellingwood, III

Ex. A

Search

Dear Walter Ellingwood,

Learn about the latest identity theft news, subscribe to useful LifeLock communications, and manage your account by signing in to your secure online portal now. If you're a LifeLock Ultimate or Command Center member, the portal is your source for proactive reports and alerts about your identity.

Use the following temporary user ID and password when signing into your account for the first time:

User ID: 8dvqmbty

Password:  *Redacted*

SIGN IN TO VIEW YOUR ACCOUNT

TIP: To change your User ID/Password at any time, click the 'Manage Account' tab at the top of the screen and then the 'Update Account Access' link on the left.



Ex. B



LifeLock Member...



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Dear Walter Ellingwood, Learn about the lat...

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